

EXHIBIT 5

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

TRINITY LUTHERAN CHURCH)
OF COLUMBIA, INC.)

Plaintiff,)

v.)

Case No. 2:13-cv-4022-NKL

Carol S. Comer, in her official)
capacity as Director of the Missouri)
Department of Natural Resources)
Solid Waste Management Program,)

Defendant.)

**DECLARATION OF RORY T. GRAY IN SUPPORT OF
PLAINTIFFS' MOTION FOR ATTORNEY'S FEES AND COSTS**

I, Rory T. Gray, under penalty of perjury, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am filing this declaration to demonstrate the reasonableness of both my hourly rate and the total amount of compensable time that I incurred in this case.

Background

2. I have worked on select aspects of this case. My principal contributions to Plaintiff's efforts were conducting legal research and writing, reviewing, and editing drafts of court filings at the supreme-court stage of the case.

3. I have practiced law for over ten years and am currently a Senior

Counsel for Alliance Defending Freedom, a non-profit public interest law firm. In this capacity, I practice exclusively in the areas of civil rights, particularly free speech and religious liberties. I practice primarily in federal court and have helped litigate cases in the Supreme Court, many courts of appeals, and multiple district courts. I am involved in all aspects of litigation, including research, drafting and filing briefs, discovery, and arguments.

4. Prior to joining Alliance Defending Freedom in 2011, I clerked for the Honorable G. Steven Agee on the United States Court of Appeals for the Fourth Circuit for a two-year term spanning 2009 to 2011. In that capacity, I assisted Judge Agee with dozens of appeals to the United States Court of Appeals for the Fourth Circuit, as well as several criminal sentencing proceedings conducted in the United States District Court for the Western District of Virginia.

5. Prior to clerking for Judge Agee, I clerked for the Honorable Bobby R. Baldock on the United States Court of Appeals for the Tenth Circuit for a two-year term spanning 2007 to 2009. In that capacity, I assisted Judge Baldock with dozens of appeals to the United States Courts of Appeals for the First, Eighth, and Tenth Circuits, as well as a regular docket of civil cases filed in the United States District Court for the District of New Mexico.

6. During my clerkship with Judge Baldock, I also served as an adjunct instructor at Eastern New Mexico University-Roswell and taught a course entitled

“Introduction to American Law” to undergraduate students.

7. I graduated *magna cum laude* from Washington and Lee University School of Law with a Juris Doctor degree in 2007. While in law school, I worked as a Summer Law Intern at the United States Department of Justice, Civil Rights Division, Educational Opportunities Section and served as a Managing Editor of the *Washington and Lee Law Review*. My student Note, *Freedom on the Rack: Stretching Academic Freedom Beyond Its Constitutional Limits in FAIR v. Rumsfeld*, 63 WASH. & LEE L. REV. 1131 (2006), was selected for publication. At graduation, I received the Barry Sullivan Constitutional Law Award.

8. I am admitted to the State Bars of Arizona, Georgia, and Virginia and am admitted to the bars of the Supreme Court of the United States, the United States Courts of Appeals for the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits, as well as the United States District Court for the Northern District of Georgia, the United States District Court for the District of Colorado, and the United States District Court for the Western District of Michigan.

9. I have also been granted *pro hac vice* admission to the bars of United States District Courts across the nation, as well as various state courts.

10. For the bars and courts in which I am admitted, I am a member in good standing and there are no grievance proceedings or any other disciplinary actions pending against me. In addition, I have never been held in contempt of court,

censured, disbarred, or suspended by any court.

11. In my time of practice as a constitutional lawyer, I have been involved in litigating multiple First Amendment cases, including: *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018); *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (represented Petitioners Geneva College and Southern Nazarene University et al.); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014) (represented Petitioners Conestoga Wood Specialties Corp. et al.); *Washington v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), *cert. granted*, 2018 WL 3096308 (U.S. June 25, 2018); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied by* 136 S. Ct. 2433 (2016); *Women’s Health Link, Inc. v. Fort Wayne Pub. Transp. Corp.*, 826 F.3d 947 (7th Cir. 2016); *Children First Found. v. Fiala*, 611 Fed. Appx 741 (2d Cir. 2015); *Little Pencil v. Lubbock Indep. Sch. Dist.*, No. 14-10731, 2015 WL 5601316 (5th Cir. Sept. 23, 2015); *A.M. ex rel. McKay v. Taconic Hills Cent. Sch. Dist.*, No. 12-753, 2013 WL 342680 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 196 (2013); *K.A. v. Pocono Mountain Sch. Dist.*, 710 F.3d 99 (3d Cir. 2013); *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 70 (2013); *Ward v. Polite*, 557 F.3d 727 (6th Cir. 2012); *Nampa Classical Acad. v. Goesling*, 447 F. App’x 776 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 1795 (2012); *Country Mill Farms, LLC v. City of East Lansing*, No. 1:17-cv-487 (W.D.

Mich. complaint filed May 31, 2017); *Telescope Media Grp. v. Lindsey*, No. 16-cv-4094 (D. Minn. complaint filed Dec. 6, 2016); *303 Creative LLC v. Elenis*, No. 1:16-cv-2372 (D. Colo. complaint filed Sep. 20, 2016); *Cochran v. City of Atlanta*, 1:15-cv-477 (N.D. Ga.) (complaint filed Feb. 18, 2015); *Knapp v. City of Coeur D'Alene*, No. 2:14-cv-441 (D. Idaho) (complaint filed Oct. 17, 2014); *Windebank v. Acad. Sch. Dist. #20*, 1:14-cv-3025 (D. Colo. filed Nov. 7, 2014); *A.Z. v. Nova Classical Acad.*, 13-cv-0975 (D. Minn. filed Apr. 25, 2013); *Gilio ex rel. J.G. v. Sch. Bd. of Hillsborough Cnty.*, 2012 WL 5289623 (M.D. Fla. 2012); *Wilson v. Juneau*, No. 1:13-CV-040-FRC (D. Mont. filed Mar. 21, 2013); *Child Evangelism Fellowship Phx. v. Dysart Unified Sch. Dist.*, No. 2:12-CF-0123-JAT (D. Ariz. Jan. 19, 2012); *Metcalf ex rel. N.M. v. Nederland Indep. Sch. Dist.*, No. 1:12-CV-0158-MAC (E.D. Tex. filed Apr. 3, 2012); and *Owasso Kids for Christ v. Owasso Pub. Sch.*, No. 11-cv-653, 2012 WL 602186 (N.D. Okla. 2012).

12. I have also worked on multiple *amicus* briefs for Alliance Defending Freedom in cases involving complex First Amendment questions and related issues, including: *Bormuth v. Cnty. of Jackson*, No. 15-1869 (6th Cir. en banc oral argument heard June 14, 2017); *Am. Humanist Ass'n v. Greenville Cnty. Sch. Dist.*, 652 Fed. App'x 224 (4th Cir. 2016); *Cent. Rabbinical Congress of U.S. & Canada v. NYC Dep't of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2015); *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580 (6th Cir. 2015); *Dariano v. Morgan Hill*

Unified Sch. Dist., 767 F.3d 764 (9th Cir. 2014), *cert. denied* 135 S. Ct. 1700 (2015); *Newdow v. Peterson*, 753 F.3d 105 (2d Cir. 2014); *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737 (Mass. 2014); *Elmbrook Sch. Dist. v. Doe*, 687 F.3d 840 (7th Cir. 2012) (en banc), *cert. denied*, 134 S. Ct. 2283 (2014); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); and *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2535 (2012).

Preclusion of Other Employment

13. By working on Trinity Lutheran's case, I was precluded from working on other matters or taking on other representation that I might otherwise have been able to take on.

14. This case imposed time limitations on my schedule as it required extensive research and writing in order to vindicate Trinity Lutheran's constitutional rights. The novel constitutional challenges necessitated by Missouri's efforts to exclude the church from the scrap tire grant program required extra amounts of my time, which precluded me from working on other matters.

15. This case would have been undesirable for most attorneys to undertake because it lacked a guaranteed fee.

Reasonableness of Rate

16. As a non-profit organization, Alliance Defending Freedom represents its clients on a *pro bono* basis. Our clients do not pay for our services or the costs

of litigation.

17. The *pro bono* representation of our clients and the national scope of our practice mean that we do not currently have internal billing rates. Alliance Defending Freedom's attorneys' fees rates are determined by billing practices in the legal market where a case is pending.

18. I have investigated and obtained information to familiarize myself with the hourly billing rates of attorneys with skill and experience in the First Amendment area of law who practice before the United States Supreme Court and in the Atlanta area, where I am located.

19. My billing rate of \$350.00 per hour for my time in this case is consistent with the prevailing market rate in the Atlanta area, where many attorneys of my experience would bill in excess of \$350.00 per hour to litigate a complex First Amendment case. This rate is also consistent with rates awarded to attorneys in similar cases in the Atlanta area and is reasonable in light of my experience in constitutional law. The concurrently-filed declarations of Wayne Bond and George Weaver attest to the area's billing rates for similar cases at the Supreme Court.

20. Additionally, my rate is very reasonable for practice before the United States Supreme Court, as the concurrently-filed declaration of frequent Supreme Court practitioner Paul Clement attests.

21. Few attorneys practice First Amendment constitutional litigation, fewer

practice constitutional litigation on behalf of plaintiffs against governmental entities, and even fewer practice exclusively in this area of law. The intent of Congress when it authorized attorney's fees and costs under 42 U.S.C. § 1988 was to permit plaintiffs to bring constitutional claims against governmental entities and also to ensure that the cost of litigation on behalf of plaintiffs seeking to vindicate their constitutional rights would not serve as a barrier to bringing such actions. Trinity Lutheran would not have been able to bring this case without the prospect of reasonable attorney's fees and costs being awarded.

Reasonableness of Time and Expenses Incurred

22. The concurrently filed itemized statement sets forth my task-based time based upon contemporaneous time records kept via the timekeeping function on in-house software as I preformed the work. I exercised my billing judgment by reducing duplicative or otherwise unreasonable time expenditures. These reductions are individually documented in the itemized statement.

23. The total time I incurred on this case is 280.9 hours. After I reviewed my time and exercised critical billing judgment, this amount was reduced to 247.8 hours. At a billing rate of \$350.00 per hour, this results in a current amount of \$86,730.00 that may properly be claimed against Defendant.

24. The concurrently filed declarations of regular Supreme Court practitioner Paul Clement as well as mid-Missouri practitioner Charles Hatfield, and

Atlanta practitioners George Weaver and Wayne Bond attest to the fact that the total time that Alliance Defending Freedom incurred in this case, including my total compensable time, is very reasonable for this type of case with its procedural history.

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 12th day of July, 2018, at Lawrenceville, Georgia.

s/ Rory Gray
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